Mehrzad Nabavieh & Anor v Chong Shao Fen & Anor and another appeal

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COURT OF APPEAL (PUTRAJAYA) — APPEAL NOS W-02(NCVC)(W)-1698–07 OF 2013 AND W-02(NCVC)(W)-1699–07 OF 2013

ALIZATUL KHAIR, LIM YEE LAN AND NALLINI PATHMANATHAN JJCA

24 MARCH 2016

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Tort — Negligence — Adjoining properties — First and second defendants commenced demolition work — Demolition work damaged adjoining plaintiffs' property — Action for negligence taken against defendants — Trial court allowed claims against first and second defendants and dismissed claims against other defendants — Parties appeal — Whether first and second defendants negligence in failing to supervise independent contractor — Whether liability should be limited to first and second defendants only on basis of non-delegable duty of care — Whether liability jointly shared amongst all defendants

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The present appeals emanated from the decision of the learned trial judge dismissing the plaintiffs' claim against several defendants in the court below. The plaintiffs were the registered and beneficial owners of a property located in Bukit Pantai, Kuala Lumpur ('the property') whereas the first and the second defendants were the owners of the lot adjoining the property. In May 2009, the first and second defendants conducted a demolishing work of an old structure on their property with a view of constructing a bungalow ('the project'). As a result of the demolition works conducted, the plaintiffs complained that their property was damaged. The plaintiffs commenced an action against the defendants in negligence. The plaintiffs sought that the first and second defendants collectively undertake the necessary repair works to restore the basic structure of the house belonging to the plaintiffs to its original state and; that the first and second defendants collectively bear the cost incurred by the plaintiffs in such restoration. At the conclusion of the proceeding, the learned judge found that the first and second defendants only and not the other defendants were to be held liable for the entire loss and damage as the trial judge reasoned that the duty of care owed by the first and second defendants to the plaintiffs was a non-delegable duty. Hence, these appeals. The plaintiffs contended that the first and second defendants were negligence in failing to supervise or rectify the acts or omissions of the independent contractor ('the fourth defendant'), which comprises negligence on the part of the first and second defendants. The plaintiffs further submitted that the first and second defendants had authorised or ratified the other defendants' tortious acts, such that they were jointly liable with the independent contractor and civil engineer

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('the fifth defendant') for the loss and damage suffered by the plaintiffs. The issues considered by the court were whether liability should be limited to the first two defendants only on the basis of the existence of non-delegable duty of care, or whether such liability was jointly shared amongst all the other defendants as tortfeasors.

Held, dismissing the appeal by the first and second defendants and allowing the appeal by the plaintiffs with costs of RM80,000:

(1) If the employer determines what is to be done and retains control of the actual performance, the doer is a servant/agent. However, if the employer prescribes the work to be done but leaves the manner of doing it to the control of the doer, the doer is an independent contractor. In the present case therefore, the third to fifth defendants fell within the category of independent contractors rather than servant/agents (see para 25).

(2) Non-delegable duties are exceptions to the general principle, that employers are not liable for the acts of independent contractors. Non-delegable duties are dependent upon a finding that the employer is in breach of some duty personally owed to the claimant. If the law imposes a strict duty on the employer, then his duty cannot be discharged by delegating work to an independent contractor (see para 32).

(3) In the present case, it would appear from the experts' reports that the first, second, fourth and fifth defendants were responsible. The first and second defendants' lack of supervision and the fourth and fifth defendants' lack of proper measures to prevent damage to the plaintiffs' property combined resulted in the loss and damage to the property. In short the expert evidence suggested liability on the part of the defendants collectively in differing proportions, rather than a non-delegable duty on the part of the first and second defendants only (see paras 43–44).

(4) On the facts, factors that gave rise to a non-delegable duty of care were not present. Thus, the learned judge erred in invoking and applying the proposition of law that the first and second defendants owed a non-delegable duty of care to the plaintiffs to the exclusion of the other defendants (see para 45).

[Bahasa Malaysia summary

Rayuan ini bermula daripada keputusan hakim perbicaraan menolak tuntutan plaintif terhadap beberapa defendan di mahkamah rendah. Plaintif adalah pemilik berdaftar dan benefisial hartanah yang terletak di Bukit Pantai, Kuala Lumpur ('hartanah') manakala defendan pertama dan kedua adalah pemilik lot bersebelahan dengan hartanah tersebut. Pada bulan Mei 2009, defendan pertama dan kedua telah menjalankan kerja-kerja merobohkan sebuah struktur lama ke atas hartanah mereka dengan tujuan untuk membina sebuah banglo ('projek'). Akibat daripada kerja-kerja perobohan yang dijalankan,

plaintif mengadu bahawa hartanah mereka telah rosak. Plaintif telah memulakan suatu tindakan terhadap defendan-defendan dalam kecuaian. Plaintif memohon bahawa defendan pertama dan kedua secara kolektif melaksanakan kerja-kerja pembaikan yang diperlukan untuk memulihkan struktur asas rumah kepunyaan plaintif kepada keadaan asalnya dan; bahawa defendan pertama dan kedua secara kolektif menanggung kos yang ditanggung oleh plaintif-plaintif dalam kerja-kerja pemulihan tersebut. Pada akhir prosiding, hakim yang bijaksana mendapati bahawa defendan pertama dan kedua sahaja dan bukannya defendan lain yang bertanggungjawab ke atas kesemua kerugian dan kerosakan kerana hakim perbicaraan memberi alasan bahawa kewajipan berjaga-jaga yang terhutang oleh defendan yang pertama dan kedua kepada plaintif adalah kewajipan yang tidak boleh diwakilkan. Oleh itu, rayuan ini dibuat. Plaintif berhujah bahawa defendan pertama dan kedua cuai apabila gagal untuk menyelia atau membetulkan perbuatan atau peninggalan kontraktor bebas ('defendan keempat'), yang terdiri daripada kecuaian di pihak defendan pertama dan kedua. Plaintif-plaintif seterusnya berhujah bahawa defendan pertama dan kedua telah dibenarkan atau mengesahkan perbuatan tort, oleh itu mereka adalah sama-sama bertanggungjawab dengan kontraktor bebas dan jurutera awam ('defendan kelima') untuk kerugian dan kerosakan yang dialami oleh plaintif-plaintif. Isu-isu yang dipertimbangkan oleh mahkamah adalah sama ada liabiliti harus dihadkan kepada kedua-dua defendan pertama sahaja atas dasar kewujudan kewajipan berjaga-jaga yang tidak boleh diwakilkan, atau sama ada liabiliti tersebut dikongsi bersama di kalangan semua defendan lain sebagai pelaku tort.

Diputuskan, menolak rayuan dengan defendan pertama dan kedua dan membenarkan rayuan oleh plaintif dengan kos RM80,000:

(1) Sekiranya majikan menentukan apa yang perlu dilakukan dan mengekalkan kawalan prestasi sebenar, pelakunya adalah seorang pekerja/ejen. Walau bagaimanapun, sekiranya majikan menetapkan kerja-kerja yang perlu dilakukan tetapi meninggalkan cara melakukannya kepada kawalan pelakunya, pelakunya adalah seorang kontraktor bebas. Dengan itu dalam kes ini defendan ketiga hingga kelima terangkum dalam kategori kontraktor bebas dan bukannya pekerja/ejen (lihat perenggan 25).

(2) Kewajipan tidak boleh diwakilkan adalah pengecualian kepada prinsip umum, bahawa majikan tidak bertanggungjawab terhadap tindakan kontraktor bebas. Kewajipan tidak boleh diwakilkan adalah bergantung kepada satu dapatan bahawa majikan melanggar beberapa kewajipan yang secara peribadi terhutang kepada pihak yang menuntut. Sekiranya undang-undang mengenakan kewajipan yang ketat ke atas majikan, maka kewajipannya tidak boleh dilepaskan dengan mewakilkan kerja kepada seseorang kontraktor bebas (lihat perenggan 32).

(3) Dalam kes ini, didapati daripada laporan pakar-pakar bahawa, defendan pertama, kedua, keempat dan kelima yang bertanggungjawab. Kekurangan penyeliaan defendan pertama dan kedua dan kekurangan langkah-langkah wajar untuk mengelakkan kerosakan kepada hartanah plaintif daripada defendan keempat dan kelima digabungkan mengakibatkan kerugian dan kerosakan kepada hartanah. Secara ringkasnya, keterangan pakar mencadangkan liabiliti di pihak defendan-defendan secara kolektif dalam perkadaran yang berbeza, dan bukannya kewajipan tidak boleh diwakilkan di pihak defendan pertama dan kedua sahaja (lihat perenggan 43–44).

(4) Berdasarkan fakta, tiada faktor-faktor yang menimbulkan kewajipan berjaga-jaga yang tidak boleh diwakilkan. Oleh itu, hakim yang bijaksana terkhilaf dalam membangkitkan dan mengguna pakai dalil undang-undang bahawa defendan pertama dan kedua berhutang kewajipan berjaga-jaga yang tidak boleh diwakilkan kepada plaintif dan tidak termasuk defendan lain (lihat perenggan 45).]

Notes

For cases on adjoining properties, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 1111–1132.

Cases referred to

Alcock v Wraith and Others (1991) Times, 23 December, CA (refd)
Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GMBH [2009] 3 WLR 324, CA (folld)
Bower v Peate (1876) 1 QBD 321, QBD (refd)
Dalton v Angus (1881) 6 App Cas 740, HL (refd)
Farraj v King's Healthcare NHS Trust [2010] 1 WLR 2139, CA (refd)
Honeywill & Stein Ltd v Larkin Bros Ltd [1934] 1 KB 191, CA (refd)
Read v J Lyons & Co Ltd [1947] AC 156; [1946] 2 All ER 471, HL (refd)
Woodland v Swimming Teachers Association and others [2014] AC 537, SC(2012) EWCA Civ 239(2013) UKSC 66 (refd)

Appeals from: Civil Suit No 22NCVC-788 of 2011 (High Court, Kuala Lumpur)

Pramjit Singh (KK Lim & Assoc) for the appellant.
Lum Chee Seng (Gunaseelan & Assoc) for the respondent.

Nallini Pathmanathan JCA:

[1] The primary issue that arises for consideration in this appeal is the relief to be granted to Chong Shao Fen and Lai Siow Lien, who were the plaintiffs in the court below, against several defendants including Mehrzad Nabavieh and

Noushin Goudarzi, who were the first and second defendants in the court below in respect of their action founded in the tort of negligence and trespass. The salient facts are set out below. The parties will be referred to as they were in the court below in Civil Suit No 22NCVC-788 of 2011.

[2] There were two appeals filed in respect of the decision of the High Court. Appeal No W-02(NCVC)(W)-1698–07 of 2013 was filed by Mehrzad Nabavieh and Noushin Goudarzi against the decision of the High Court in allowing the claim against them only, but not the other defendants, while Appeal No W-02(NCVC)(W)-1699–07 of 2013 was filed by Chong Shao Fen and Lai Siow Lien to appeal against that part of the High Court decision which dismissed their claim against the other defendants. In essence, both appeals deal with the dismissal of the plaintiffs' claim against the third, fourth and fifth defendants namely the architect, the independent contractor and the civil engineer.

THE PARTIES

[3] The plaintiffs, Chong Shao Fen and Lai Siow Lien ('the plaintiffs') are the joint registered and beneficial owners of the property bearing the address No 50, Jalan Taman Pantai, Bukit Pantai, 59100 Kuala Lumpur held under Geran No Hakmilik: 2724, Lot 14960, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ('the property'). A three-storey bungalow is erected on the property.

[4] The first and second defendants, Mehrzad Nabavieh and Noushin Goudarzi ('the first and second defendants) are the registered and beneficial owners of the lot adjoining the property. The first and second defendants' property bears the address No 52, Jalan Taman Pantai, Bukit Pantai, 59100 Kuala Lumpur held under Geran No Hakmilik: 2723, Lot 14959, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ('the neighbouring property').

[5] The other defendants in the High Court are collectively the architect, namely Designworks Architects & Construction Sdn Bhd ('the third defendant'); the independent contractor, namely Majestic United Sdn Bhd ('the fourth defendant'); and the civil engineer, Azman bin Teh ('the fifth defendant').

BACKGROUND FACTS

[6] The plaintiffs have been residents at the property since 2001.

[7] In May 2009, the first and second defendants commenced work on their

property with a view to demolishing an old structure which stood on their property and to construct a two-storey (above) and three-storey (below) bungalow ('the project').

[8] The plaintiffs complained that as a result of the demolition works on the first and second defendants' property, in mid-July 2009 the plaintiffs' property was damaged.

[9] The damage manifested itself in the form of:

(a) cracks on the common wall;

(b) the drains beside the common wall cracked, and soil from the project site flowed on to the plaintiffs' property;

(c) the concrete flow and the staircase at the back of the plaintiffs' property cracked; and

(d) a large hole appeared in the garden beside the house.

[10] The plaintiffs commenced a suit against the defendants in negligence complaining of, inter alia, the following matters:

(a) the failure as a whole to take reasonable care in executing the project;

(b) the failure to follow the plans as approved by 'Jabatan Rekabentuk Bandar dan Bangunan' in the execution of the project;

(c) the failure to take into consideration the condition and stability of soil at the site of the project and the surrounding area before commencing the demolition and the excavation;

(d) the failure to monitor the soil condition at the site of the project and also the surrounding area before and during the demolition and the excavation; and

(e) the failure to monitor the workers at the site of the project sufficiently and/or at all, to ensure the construction work is stopped upon discovering damage to the plaintiffs' house.

[11] As a consequence, the plaintiffs have sought the following reliefs:

(a) that the first and second defendants collectively undertake the necessary repair works to restore the basic structure of the house belonging to the plaintiffs to its original state; and

(b) that the first and second defendants collectively bear the cost incurred by the plaintiffs in such restoration.

THE HIGH COURT DECISION

[12] In his judgment, the learned trial judge found that the first and second defendants only were to be held liable for the entire loss and damage suffered by the plaintiffs. The third, fourth and fifth defendants were held to be not liable for this loss and damage as the trial judge reasoned that the duty of care owed by the first and second defendants to the plaintiffs was a non-delegable duty.

[13] As such, the learned judge ordered:

(a) that the first and second defendants and/or their servants cause the land and drainage systems to be immediately backfilled and the property compacted within one month of the date of the judgment;

(b) that the first and second defendants commence the reinstatement work for the collapsed wall and boundaries within one month of the date of the judgment;

(c) if they fail to do so within the time stipulated, the plaintiffs were entitled to carry out these works and recover such costs from the first and second defendants.

[14] Finally, the learned judge also awarded general damages in favour of the plaintiffs to be assessed by the court.

THE DECISION OF THE COURT OF APPEAL

[15] Having heard the parties, we were not convinced that Appeal No W-02(NCVC)(W)-1698–07 of 2013 should be allowed in respect of liability. In short, we concurred with the learned judge that the first and second defendants were liable for the losses suffered by the plaintiffs. However, we differed from the learned judge in that we concluded that the fourth and fifth defendants, namely Majestic United Sdn Bhd and Azman bin Teh, were also joint tortfeasors who were liable in differing proportions.

[16] Further, we did not concur with the learned judge that the duty of care owed by the first and second defendants to the plaintiffs was a non-delegable duty, albeit under common law or statute.

[17] The general position is that if an employer, such as the first and second defendants here, have employed an independent contractor to do work on their behalf, the first and second defendants are not responsible for any tort committed by the independent contractor in the course of the execution of the work. As such, they are not liable directly for any torts committed, unless the

damage complained of may also be attributable to the negligence or personal fault of the employer.

[18] In the instant case, the plaintiffs have alleged negligence on the part of the employers in failing to oversee or supervise or rectify the acts or omissions of the independent contractor, which comprises negligence on the part of the first and second defendants. Additionally, it is alleged that the first and second defendants have authorised or ratified the other defendants' tortious acts, such that they are jointly liable with the independent contractor and civil engineer for the loss and damage suffered by the plaintiffs.

[19] We were therefore not persuaded that this was a case where the duty of care owed by the first and second defendants to the plaintiffs is a non-delegable duty. In his grounds of judgment, the learned judge failed to explain or substantiate his basis for concluding that the duty owed, on the facts of this case, amounted to a non-delegable duty. The learned judge simply concluded that this was the case, citing the English decision of *Bower v Peate* (1876) 1 QBD 321.

[20] The principle to be gleaned from *Bower v Peate* is that no man can get rid of liability for injury occasioned to another by a wrongful act, by seeking to throw the responsibility on an agent whom he has employed to do the act.

[21] The evidence in this case shows, however, that this is not a case where the employer can be said to be completely exempt from liability for negligence, simply because he has hired the independent contractor to carry out the works. This will be discussed further below.

[22] Neither was this a case where the independent contractor could be held to be completely exempt from liability on the grounds that the first and second defendants had a common law non-delegable duty to bear all responsibility for the loss suffered. The plaintiffs had not in any event pleaded any such non-delegable duty. The plaintiffs sought a prayer for joint liability amongst the defendants as tortfeasors.

[23] The issue of the existence of a non-delegable duty was not put to the parties to allow them to invoke or submit on this issue. It would appear that the learned judge had imposed such a non-delegable duty on solely the first and second defendants in his judgment without the benefit of any submissions on this point. In short, the parties were deprived of being heard on this issue, namely whether the first two defendants owed a common law non-delegable duty to bear responsibility for all loss suffered as a consequence of the construction on the neighbouring lot.

The law: withdrawal of support from neighbouring land

[24] The case of *Bower v Peate* is classified by *Clerk & Lindsell, 20th Ed, Sweet & Maxwell (2010)* under the sub-heading of 'withdrawal of support from neighbouring land'. The issue that falls for consideration in our case is whether liability should be limited to the first two defendants only on the basis of the existence of a non-delegable duty of care, or whether such liability is jointly shared amongst all the other defendants, as tortfeasors.

[25] In deciding the said issue, it is necessary to ascertain whether the third to fifth defendants are servants/agents or independent contractors. This is because the first and second defendants would be vicariously liable for the acts of the third to fifth defendants if they were servants/agents. But if they are independent contractors, the general principle applies, ie that the employers would not be liable for their negligent acts. The English Court of Appeal case of *Honeywill & Stein Ltd v Larkin Bros Ltd* [1934] 1 KB 191 is of assistance in differentiating between a servant/agent and an independent contractor. If the employer determines what is to be done and retains control of the actual performance, the doer is a servant/agent. However, if the employer prescribes the work to be done but leaves the manner of doing it to the control of the doer, the doer is an independent contractor. In our case therefore, the third to fifth defendants fell within the category of independent contractors rather than servant/agents. To that extent the general principle will prevail, ie that the first and second defendants would not be liable for the negligent acts of the third to fifth defendants.

[26] After the case of *Bower v Peate*, the English House of Lords in the case of *Dalton v Angus* (1881) 6 App Cas 740 held that when an employer contracts for the performance of work, which properly conducted can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor.

[27] That is the general principle, that employers are not liable for the acts of independent contractors. However in that case, Lord Watson went on to say that in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is therefore liable, *as well as the contractor*, to repair any damage which may be done. (Emphasis added.) Therefore applying Lord Watson's pronouncement here, the first and second defendants should not be held liable alone. The fourth and fifth defendants should also be liable for the damage which was occasioned to the plaintiffs' property.

[28] Subsequent to these cases, the English Court of Appeal in the case of

Alcock v Wraith and Others (1991) Times, 23 December held that the general rule is that one is not responsible for a tort by an independent contractor. But the exception is where the activity involved some special risk of damage, or is work which from its very nature was likely to cause danger/damage. The true basis for the exception in party-wall cases was where the law conferred a right to carry out work on a wall/division, and that work involved a risk of damage to the adjoining property, the law also imposed a duty on the party carrying out the work to ensure that it was carried out carefully.

[29] In *Alcock v Wraith and Others*, Neill LJ stated that the owner of the damaged property was certainly entitled to claim damages against the independent contractor for negligence and trespass. His Lordship stated that for the purpose of deciding whether he could recover damages from the employers of the independent contractor, it did not matter whether the claim was framed in negligence, trespass or nuisance. His Lordship went on to hold that the owner of the damaged property could claim against the employers of the independent contractor. There was no further pronouncement made that the independent contractor was also liable, probably because it was stated at the outset that the independent contractor was adjudged a bankrupt after conducting the works which caused the damage to the property.

[30] Therefore from a consideration of the case law subsequent to *Bower v Peate*, it may be concluded that both the independent contractor as well as the employer would be liable for any damage occasioned to the property of neighbouring land.

The law: non-delegable duties

[31] The learned judge did not define what exactly amounts to a non-delegable duty of care, despite relying on this principle in his decision. This area of the law has been less than certain, as case law reveals that the courts have no one particular test in determining what amounts to a non-delegable duty. Therefore, it appears to us that an overview of the law relating to non-delegable duties would be timely.

[32] Non-delegable duties are exceptions to the general principle, that employers are not liable for the acts of independent contractors. According to *Clerk & Lindsell*, non-delegable duties are dependent upon a finding that the employer is in breach of some duty personally owed to the claimant. If the law imposes a strict duty on the employer, then his duty cannot be discharged by delegating work to an independent contractor. There are statutory as well as common law non-delegable duties. However, for our purposes we will consider common law non-delegable duties since the parties did not invoke any statute which imposed non-delegable duties on the first two defendants.

[33] The textbook author acknowledged that it is difficult to know when non-delegable duties exist at common law, but submitted that a telling feature of the leading cases is that there is nearly always an affirmative duty for which the defendant has assumed responsibility.

[34] It is noted that the case of *Honeywill v Larkin* is authority for the proposition that the employer is liable for extra-hazardous acts of independent contractors. However, a recent English Court of Appeal decision in *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GMBH* [2009] 3 WLR 324 stated that the application of the *Honeywill* principle should be kept as narrow as possible, and it should be applied only for activities that are exceptionally dangerous, whatever precautions are taken. The court adopted the words of Lord Macmillan in *Read v J Lyons & Co Ltd* [1947] AC 156; [1946] 2 All ER 471 on the suggested distinction between activities dangerous in themselves and those that are not:

> In truth it is a matter of degree ... it would be impracticable to frame a legal classification of things as things dangerous and things not dangerous, attaching absolute liability in the case of the former but not in the case of the latter.

[35] Therefore, applying the case of *Biffa*, it is not practical to have two lists of dangerous acts and non-dangerous acts. Further, it should not be an unshakeable presumption that employers are liable for dangerous acts of independent contractors. Each act and its circumstances should be looked at to determine whether an employer should be liable for the tort of the independent contractor.

[36] In the English Court of Appeal case of *Farraj v King's Healthcare NHS Trust* [2010] 1 WLR 2139, Dyson LJ at para 91 stated:

> But in any event, to ask what the expectations of the claimant, whether reasonable or otherwise, would have been does not provide the answer to the question whether the hospital owes a non-delegable duty of care. I think that it is better to acknowledge that the question whether an employer owes a non-delegable duty of care to his employees to provide a safe system and whether a hospital generally owes a non-delegable duty to its patients is one of policy for the courts to determine by reference to what is *fair, just and reasonable*. (Emphasis added.)

[37] In the English Supreme Court case of *Woodland v Swimming Teachers Association and others* [2014] AC 537(2012) EWCA Civ 239(2013) UKSC 66, Lord Sumption JSC set out in para 23 the factors that have given rise to non-delegable duties of care:

> If the highway and hazard cases are put to one side, the remaining cases are characterised by the following defining features: (1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the

protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes. (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren. (3) The claimant has no control over how the defendant chooses to perform those obligations, ie whether personally or through employees or through third parties. (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it. (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

[38] Here, can it be said to be 'fair, just and reasonable' as in *Farraj* that the first and second defendants be held to owe a non-delegable duty to the plaintiffs? In our view, that cannot be the case because the factors characteristic of the existence of such a non-delegable duty of care do not exist. Moreover the evidence from the expert reports shows that the both the first and second defendants as well as the other defendants should be liable in negligence to the plaintiffs.

The evidence

[39] The evidence adduced through the two experts, Sr Prof William Napier Hamilton ('Professor Hamilton') and Ir Dr Gue See Sew of G & P Geotechnics ('Dr Gue'), discloses that the loss and damage suffered by the plaintiffs was caused by the acts and omissions of the fourth and fifth defendants, and the first and second defendants in failing to supervise or causing the fourth and fifth defendants to rectify the damage.

[40] Professor Hamilton found in his report that the collapse of the boundary wall and garden area of the property resulted from the unsupported excavation for the construction of deep basement areas on the neighbouring lot. The contractor only undertook construction of a retaining wall after the collapse of the boundary wall and garden area. Before this, little had been done to protect the property, despite signs of significant soil movement in the lower garden area a few weeks before the collapse.

[41] It was the opinion of Professor Hamilton that:

> It is quite astonishing that such an extensive and deep excavation along the boundary of the adjoining property was made without adequate safety protection, not only for the workers on site but more importantly in this case, to safeguard lives and property at risk from the construction works to the neighbours on the adjoining lot ... It is obvious that without providing proper support to the face of the excavations as the work progressed, the owners of the neighbouring Lot, their architects, engineers and contractors have been negligent and put the lives of the occupants of No 50 Jalan Taman Pantai, and their property, at high risk.

[42] Professor Hamilton commented that the work on the property was of a standard much below the original provision due to the use of much unskilled labour resulting in poor workmanship; use of low quality materials; lack of competent supervision etc.

[43] It would appear from Professor Hamilton's report that the first, second, fourth and fifth defendants are responsible. The first and second defendants' lack of supervision and the fourth and fifth defendants' lack of proper measures to prevent damage to the plaintiffs' property combined resulted in the loss and damage to the property.

[44] Dr Gue's report also observed that the collapse of the boundary wall and garden area of the property was due to the excavation at the neighbouring lot. Dr Gue found that proper temporary support was not provided by the contractor during the excavation, causing loss of support to the boundary wall and garden area. The collapse of the boundary wall and garden area in turn caused cracks and damages to the remaining boundary wall. In short the expert evidence suggests liability on the part of the defendants collectively in differing proportions, rather than a non-delegable duty on the part of the first and second defendants only.

[45] None of the factors that give rise to a non-delegable duty of care as in *Woodland* are present on the facts of our case. As such, it is our considered view that the learned judge erred in invoking and applying the proposition of law that the first and second defendants owed a non-delegable duty of care to the plaintiffs to the exclusion of the other defendants.

Apportionment of liability

[46] We therefore varied the finding of liability to the extent that the independent contractor and engineer are joint tortfeasors with the owners of the neighbouring property. Our conclusion is supported by the evidence of the experts as set out above. Accordingly, liability was apportioned in the following ratios:

(a) the contractor, namely the fourth defendant, is 40% liable for the

damage suffered by the plaintiffs together with the costs of the restitution works carried out on the property;

(b) the engineers, namely the fifth defendant, are 30% liable for the damage suffered by the plaintiffs together with the costs of the restitution works carried out on the property;

(c) the liability of the first and second defendants is therefore reduced to 30%; and

(d) no liability is attributable to the architects, namely the third defendant.

The relief granted by the high court was not adequate

[47] Dr Gue made the following recommendations for immediate action in his report:

(1) The collapsed land and drainage system shall be immediately backfilled and reinstated to prevent further erosion that could deteriorate and affect the bungalow's stability. Granular backfill material or sand should be properly compacted using either a rammer or small compactor.

(2) The reinstatement works of the boundary wall, external staircase, tiling works, garden features, etc could be carried out after the backfiling.

(3) The remedial works shall be carried out under supervision of the design engineer's representative.

[48] These recommendations made by Dr Gue were duly carried out *prior to the conclusion of the trial*. In point of fact, a site visit was undertaken by the learned judge and the parties, and the remedial works undertaken were pointed out. Notwithstanding this the learned judge granted the same relief again at the conclusion of trial namely that:

(a) the land and drainage systems were to be immediately backfilled and properly compacted;

(b) the first and second defendants to begin reinstatement works for the walls and boundary which had collapsed within one month from the 26th June 2013, ie on or by 25 August 2013. The costs of such reinstatement works are to be borne by the first and second defendants;

(c) if the first and second defendants fail to carry out the foregoing, the plaintiff is entitled to carry out other works and recover all costs from the first and second defendants; and

(d) general damages to be assessed.

[49] The foregoing relief amounted to a replication of the earlier relief carried out prior to the site visit by the parties during the trial. In essence, the

final relief ordered by the judge was ineffective as it had already been carried out, to no avail. For this reason, we were not satisfied that adequate relief had been granted to the parties.

[50] As such, we set aside the remedies as ordered by the learned judge and made the following orders:

(a) that Dr Gue be appointed jointly by the parties to conduct an independent inspection and assessment of the property and make the necessary recommendations to reinstate the property such that it is safe for habitation within two weeks from the date of our decision;

(b) that Dr Gue's recommendations be implemented within three months from the date of his report, by the first and second defendants;

(c) in the event that the first and second defendants fail to carry out Dr Gue's recommendations, the plaintiffs are at liberty to carry out the recommendations and the costs so incurred are to be borne by the first and second defendants and/or the fourth and fifth defendants.

(d) the order for general damages is affirmed as per para (iv) of the order; and

(e) parties are at liberty to apply to this court.

CONCLUSION

[51] In summary therefore, we dismissed Appeal No W-02(NCVC)(W)-1698–07 of 2013 but varied the relief granted by High Court judge. We allowed Appeal No W-02(NCVC)(W)-1699–07 of 2013 and apportioned liability between the defendants.

[52] For both appeals, we granted costs of RM80,000 to the respondents in Appeal No W-02(NCVC)(W)-1698–07 of 2013, ie the appellants in Appeal No W-02(NCVC)(W)-1699–07 of 2013. Both the deposits are refunded.

First and second defendants' appeal dismissed and; plaintiffs' appeal allowed with costs of RM80,000.

Reported by Dzulqarnain Ab Fatar